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No.

IN THE

Supreme Court of the United States

October Term, 1982

PETER MARTELL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

F. EMMETT FITZPATRICK
F. EMMETT FITZPATRICK, P. C.
28th Floor
2000 Market Street
Philadelphia, PA 19103
(215) 963-2700
I.D. #00001
Attorney for Petitioner

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Whether the Government failed to establish the elements of knowledge, possession in the Eastern District of Pennsylvania, value and theft so as to meet the statutory elemental proofs of the alleged offense?

2. Whether the Court improperly admitted evidence of other offenses?

3. Whether the Court improperly refused defendant's request to charge the jury?

4. Whether the Government failed to establish a conspiracy?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of parties to the proceeding in this Court.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

PETER MARTELL,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

Opinions Below:

The Judgment Orders of the United States Court of Appeals for the Third Circuit are not yet reported. Copies of the Judgment Order is attached as Appendix "A". There was no Opinion filed for the United States District Court for the Eastern District of Pennsylvania in the above matter, but the Judgment Order is attached as Appendix "B".

STATEMENT OF JURISDICTION

The Judgment Orders of the United States Court of Appeals for the Third Circuit below were filed on June 17, 1982 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "...nor shall any person...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to the Third Circuit Court of Appeals challenging the conviction of petitioner in a criminal prosecution in the United States District Court for the Eastern District of Pennsylvania.

The Government charges the defendant in Count One with participating in a conspiracy from March 10, 1978 through March 22, 1978 with Daniel L. Ceasar to pledge as security for a loan, securities of the value of more than $500.00 knowing that these securities had been stolen from interstate commerce.

In Count Two, defendant is charged on the 15th day of March, 1978, with causing the transportation in interstate commerce from New Jersey to Pennsylvania of stolen bonds having a value in excess of $5,000.00, knowing them to have been stolen. Following a jury trial the defendant was found guilty of all three Counts on July 23, 1981 and was subsequently sentenced to five years imprisonment on Count One to be followed by five years probation on Count Two. Sentence was suspended on Count Three.

The Government's main witness was Daniel L. Ceasar, who is referred to in the present

indictment as an unindicted co-conspirator. Mr. Ceasar indicated that he first met the defendant some time in June of 1977 and both of them worked for a period of time upon a plan to market olive oil in the United States. At some point during their relationship, Ceasar mentioned that he was trying to buy the Cherry Hill Inn and needed capital. The defendant indicated that he knew investors who might be interested in placing some securities as collateral for a bank loan in order to enable Ceasar to borrow the necessary funds. (218a).

As evidence of the possession of bonds by these investors, the defendant caused to be mailed to Ceasar a photostatic copy of a Salt River Project Bond issued by the State of Arizona. (221a-223a). Ceasar checked this bond with his broker to determine whether or not it was registered and trading and was assured that it was. (222a). However, by the time the principle was approved, the

Arizona Salt River Project Bonds were not available and the defendant indicated that his investors could provide some Western Airlines Bonds for the same purpose and upon the same terms. Ceasar testified that the defendant indicated that these bonds were indeed not stolen and came from a reputable house in New York. (228a).

On March 15, 1978, Ceasar drove from Philadelphia to Paramus, New Jersey, where the Western Airline Bonds, which constitute the gravamen of the instant offense, were delivered to him in a diner wrapped in newspaper. He brought these bonds back to Philadelphia and very shortly thereafter attempted to pledge them as collateral for a loan at Continental Bank.

Mr. Ceasar testified directly and in a manner that remained uncontradicted that on the day he received these bonds he had no knowledge that they were stolen. (445a). As

late as several days later when he was arrested by the FBI, he still had no knowledge that the bonds were stolen. (366a). The bonds were taken to an associate in Philadelphia named Robert Baron, who typed in Mr. Ceasar's name and perhaps certain dollar amounts. Certain of the bonds were shown to individuals at Continental Bank who called a central registry in New York to determine the validity of the bonds. In spite of the fact that Wayne Milligan of Continental Bank read the wrong numbers from the bonds, he received information that something was wrong with the bonds, at least because the dollar figures typed into the bonds did not correspond with the code contained on the face of the bonds. Continental Bank never granted the loan but never indicated to Mr. Ceasar that the loan would not be granted.

Very shortly after the first contact with Continental Bank, Daniel Ceasar and Robert Baron drove to New Jersey and obtained a loan

of $130,000.00 from the First Peoples Bank of New Jersey. Within days the FBI questioned both Baron and Ceasar and both were less than truthful in their interviews. Ceasar was arrested and very shortly thereafter contacted the defendant and was informed by him that the defendant did not know that the bonds were stolen.

At no time does the Government's evidence show that the defendant was in the Eastern District of Pennsylvania in possession of the bonds. Moreover, there is absolutely no evidence from anyone that the defendant ever knew, if indeed he delivered the bonds to Ceasar on March 15, that Ceasar was transporting the bonds in interstate commerce. The only conversation between these two was that the bonds were to be used for the purpose of a hotel which was also located within the State of New Jersey.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI:

I. The Court of Appeals has decided a Federal question in conflict with applicable decisions of other Circuits.

The Court improperly refused the defendant's request to charge the jury.

At the conclusion of the Court's charge, counsel for the defendant requested that the Court charge the jury that Daniel Ceasar was an accomplice of the defendant and as such his testimony came from a polluted source. The Court refused to do so. (821a). This in spite of the fact that the entire transportation of these bonds in interstate commerce on the day in question was done solely by Ceasar and not by the defendant. The pledging of the bonds and the various misrepresentations that were made were made by Ceasar and not by the defendant and in no circumstances did Ceasar testify that the defendant suggested any of the lies or mistruths that

Ceasar transmitted to the various banks. Even Ceasar himself admitted that those lies regarding his assets, salary, commissions that he received, real estate that he owned and loans to various other people were created by himself. (345a-355a). Under these circumstances, it is respectfully submitted that the Court erred when they refused to charge the jury that Mr. Ceasar was indeed an accomplice of Mr. Martell and for that reason his testimony came from a polluted source.

The Court requested in Point #4 submitted by counsel for the defendant to charge the jury as follows:

> "The Government has introduced in this case false exculpatory statements made by the defendant. I charge you that they may be considered by you as circumstantial evidence pointing to the consciousness of guilty. I charge you further that you may not regard them as evidence of guilt. A defendant may feel in some fashion guilty without actually being guilty of committing a criminal offense."

This charge was based upon United States v. Boekelman, 594 F.2d 1238 (9th Cir. 1979). The

Court refused to give this charge in this case where the only statements made by the defendant that could be considered in any fashion incriminating had to do with a manufactured story and where the defendant never admitted and in fact denied any knowledge that the bonds were stolen, it is respectfully submitted that refusal to give such a charge when requested is prejudicial reversible error.

In connection with Count Two, the Court did indeed charge the jury must find that Daniel Ceasar had actual knowledge that the bonds were stolen. In connection with Count Three, the Court refused to give such charge (820a). This Count deals with the transportation in interstate commerce of bonds from New Jersey to Pennsylvania on March 15, 1978. It left the jury free to find that this knowing interstate transportation of stolen property could be accomplished by an individual who has no actual knowledge that the bonds were stolen. As such it violated the knowledge requirement set

forth in the United States v. Gallo, 543 F.2d 361 (D.C. Cir. 1976).

II. The Court of Appeals below has decided an important question of law which should be settled by this Court.

The Court improperly admitted evidence of other offenses.

Evidence of other crimes is not admissible to prove the character of a person or in order to show that he acted in conformity therewith. Federal Rules of Evidence 404. In spite of the apparent clarity of this Rule, the appellate courts have long labored with under what circumstances evidence of other offenses should be admitted. This Circuit has noted the importance of avoiding the undue prejudice which arises from the admission of evidence concerning prior crimes which has little probative value for the issue being tried. United States v. Cook, 538

F.2d 1000 (3rd Cir. 1976). This Circuit further considered the term of the conspiracy charge in the indictment and ruled that evidence of illegal acts which occurred outside that time constituted prejudicial error. United States v. Boyd, 595 F.2d 120 (3rd Cir. 1978). In the present case, the indictment charges a specific conspiracy between March 10, 1978 and March 22, 1978 involving Western Airline Bonds. When the matter was called for trial, the Court conducted a conference at which time it became apparent for the first time that the Government was attempting to show also that the defendant was dealing with Airzona Salt Project Bonds which the Government contended were stolen. The defendant objected to the inclusion of such evidence and in the alternative, requested a delay to allow a defense for such newly exposed charges. Both motions were denied and over continuing objection at trial, the Government was allowed to show that the defendant had offered to Daniel Ceasar the Salt River Project

Bonds. (234a). The defense objected to the characterization of these bonds as stolen without avail. (462.1a). The evidence showed actually that a photostat of a bond was forwarded to Daniel Ceasar. A representative of the New York Police Department however could not say whether that photostat was of a counterfeit bond or of a stolen bond and could not further testify under what circumstances these bonds were allegedly stolen. (480a). The only other witness presented concerning these bonds testified that they were reported missing (467a), and that they were never in his possession and therefore never stolen from him. (470a).

The entire cumulative effect of the Government charging on the day before trial a new offense resulted in an unfair extension or amendment of the indictment and as such placed the defendant in a position of defending charges beyond the period of a conspiracy for which it was brought to trial. United States v. Cusmano, 659 F.2d 714 (6th Cir.

1981). United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980).

In addition to the evidence about a completely separate offense the Government was permitted, over objection, to introduce testimony from Daniel Ceasar about a conversation that took place on March 25 which was three days after the conspiracy charged allegedly ended in New Jersey and to repeat remarks made by an individual known only as Charley, who suggested that Ceasar create a fictitious story to tell law enforcement authorities. (28la et seq.)

In spite of allowing evidence, not only by the defendant but by third parties never shown to be associated with the defendant concerning false exculpatory statements, the Court refused to charge that these statements were not evidence of guilt. United States v. Boekelman, 594 F.2d 1238 (9th Cir. 1979).

III. The Court of Appeals below has decided an important question of law which should be settled by this Court.

The Government failed to establish the elements of the offense.

The Court quite properly charged the jury at page (811A) that the Government must prove beyond a reasonable doubt that the bonds were possessed in the Eastern District of Pennsylvania, that Daniel Ceasar who is the only co-conspirator to possess them here actually knew that they were stolen, that they were valued at over $100.00, and that they had been stolen from a storage facility while in inter-state commerce.

Knowledge.

The defendant did not testify. An FBI agent who interviewed him did (620a) and testified that the defendant denied any knowledge that the bonds were stolen. The Government did not prove the element of knowledge that the bonds were stolen by any statement made by the defendant to law

enforcement authorities.

The defendant in his conversations with Daniel Ceasar told Ceasar that the bonds were not stolen. (228a). Even after Ceasar was arrested when he called the defendant, the defendant said he did not know the bonds were stolen. (279a). Furthermore, Ceasar testified that the defendant never told Ceasar that he, the defendant, had the bonds. What he said that he was "going to get bonds". (385a-386a). Thus, even through the testimony of Daniel Ceasar, the Government never offered any evidence that the defendant knew or admitted that the bonds were stolen.

Beyond the knowledge of the defendant, the Court indicated in its charge that it was necessary that the Government prove beyond a reasonable doubt that Daniel Ceasar knew that the bonds were stolen. But Ceasar testified that on the day he received the bonds, March 15, 1978, he had no knowledge that they were

stolen. (445a). He further testified that on the day of his arrest, March 23, 1978, he told the FBI that he did not know that the bonds were stolen. He testified further that this was indeed the truth. He did not know at that time that the bonds were stolen. (366a).

In light of this direct testimony, it is respectfully submitted that the jury could not speculate in face of uncontradicted testimony regarding actual knowledge on the part of Daniel Ceasar, who was the only other co-conspirator named. All jury verdicts must be given the widest latitude and while a jury must be allowed to draw inferences, they cannot under these circumstances properly infer that Daniel Ceasar knew that these bonds were stolen during the period of this conspiracy, when Daniel Ceasar testified directly under oath that he did not have such knowledge. It is further submitted that no amount of suspicion or "queasy feeling" on the part of Mr. Ceasar forms a sufficient basis for

any such inference in light of the denial of actual knowledge by Mr. Ceasar.

Possession in the Eastern District of Pennsylvania.

The defendant lived and worked in Paramus, New Jersey. Ceasar visited the defendant in order to pick up bonds and in spite of lengthy testimony about the arrangements and conversations between the two, never indicated that the bonds were to be taken from the State of New Jersey. On the contrary, the Government's entire evidence was that the bonds were to be pledged as collateral to purchase a hotel in the State of New Jersey. Had the bonds indeed never left the State of New Jersey, these specific charges could not have been sustained under Count Three. There is absolutely no evidence on which the jury could have concluded that the defendant caused the transportation in interstate commerce from New Jersey to the Eastern District of Pennsylvania on the 15th day of March, 1978.

Value.

The three Counts of the indictment charge that the jury must find that the bonds had certain values. Count One requires a value of $500.00; Count Two requires a value in excess of $100.00 and Count Three charges a value in excess of $5,000.00. The Government therefore set about to prove the value of these bonds.

The Government's first witness, Maurice Durlin, indicated that to the best of his knowledge there was no dollar amounts typed in the bonds as they were shipped and he does not believe that they contained a signature. (67a-69a).

Another Government witness, Michael Carragee, who is the Assistant Security Director of Bradford National Corporation, regarded the certificates as shipped as worthless pieces of paper that there not registered or not negotiable. (201a). Even after names and dollar amounts had been typed on the certificates, a telephone call from the bank to

the Security Information Center or to the transfer agent, which is not incidentally required as of 1978, would have shown that the bonds had no value. (206a). Indeed this is exactly why Continental Bank did not loan any money following the telephone call from the loan officer, Wayne Milligan to Mr. Carragee.

The Government when faced with this testimony destroying an essential element of the offense, produced Philip Kitzer as an "expert witness". Mr. Kitzer related a series of peculations which resulted in him being indicted six times and indicated that he was currently on parole. (681a). Mr. Kitzer detailed a number of schemes which required the individual or company accepting stolen bonds as collateral to be involved to some degree in a plot to substitute stolen securities for valid ones. The Court overruled objections to the qualifications of Mr. Kitzer as an expert and allowed him to testify anyway that in his

opinion the particular bonds in this case were worth a half a million dollars. (697a).

It is respectfully submitted that in light of the firm and uncontradicted testimony of Michael Carragee, who is legitimately employed and familiar with the specific bonds in this case and who testified that they had no value before or immediately after their delivery to Daniel Ceasar to allow such speculative underworld expertise to establish a "value" makes silent mockery of the jurisdictional image established by Congress.

The Theft.

The Government recognized that it had to prove that these particular bonds were stolen from a facility in interstate commerce. The first witness, Maurice Durlin, testified that he was Security Director for the Jeffries Bank Note Company, who allegedly manufactured these bonds back in 1977. He had no personal knowledge

that related in any manner to the manufacture, shipment or reported loss of these bonds. As a matter of fact he did not begin to work for Jeffries Bank Note Company until December of 1978, approximately a year and a half after the alleged disappearance of these bonds.

Mr. Durlin, over strenuous objection, testified from a file that was not kept or prepared by him nor was it kept or prepared by anyone under his direction or control. (24a). As a matter of fact, the actual file that he testified from he did not bring with him and was not maintained by the company, but was kept here in the Eastern District of Pennsylvania somewhere by some law enforcement agencies. He only "assumed" and could not swear, that the file presented to him as the basis for his testimony was exactly the same file as that maintained by his company in California. (26a-27a). He testified further that it was,

at the time of his testimony, his company's position that they did not know whether the certificates were lost or stolen. (33a).

He further testified that the company does indeed maintain a file of bonds which it destroyed shortly after the manufacturing process if for any reason they were defective, but that he never checked the file to determine whether the Western Airline Bonds were included as having been destroyed by the company. (54a). In spite of a motion to strike his testimony because it was based upon business records not properly authenticated, the testimony was allowed to stand (71.1a). In spite of this, none of the records showed that the bonds were actually manufactured or delivered to anyone.

A series of witnesses then testified that, according to their normal routine, they picked up certain packages from the Jeffries Bank Note Company and transported them through a series of

moves to American Airlines to be flown to New York. None of this testimony established that there was any identification of the contents of these packages as Western Airline Bonds, let alone the specific Western Airline Bonds charged as the gravamen of this offense. The container which allegedly contained these bonds was apparently delivered to a warehouse in New York where it was opened by someone who did not check its contents against any list or manifest. (149a). If indeed these bonds ever reached that point, they were stored in a warehouse the size of a football field where various drivers wander in and out around the clock. (152a). Mr. Johnston, who testified for the Government that he was in charge of that warehouse, testified that he did not check the manifest of what a driver takes out (154a). Around the period of time when these bonds were alleged to have been stolen, he noticed no evidence of breaking or entering in the warehouse or of any other theft (160a) but he did

acknowledge that it was a common, everyday occurrence that packages were missing from this warehouse. (161a).

Another driver, John Conway, testified that it is even possible that this package could have been picked up and delivered at a later point in time. (167a).

Nicholas Polyniak from the Certificate Control Center of Chase Manhattan, who was the proposed ultimate recipient of these bonds, testified that his records did not begin until December of 1977 and he had no knowledge other than the records. He did admit, however, that it was possible that the certificates were delivered to their ultimate consumer, but never entered on the log. (178a). Replacement certificates which were subsequently ordered and supposedly received in May of 1977 were never entered on the log until November of 1977. (179a).

It is respectfully submitted that in light of this direct testimony, the Government has completely failed in its obligation to show that these particular bonds were stolen from a storage facility while in interstate commerce.

The entire reliance throughout the Government's attempt to prove the theft upon business records completely contravened Rule 901 of the Federal Rules of Evidence.

IV. The Government failed to establish the charged conspiracy.

The conspiracy charged in Count One began on March 10, 1978 and lasted through March 22, 1978. It was a conspiracy charged between the defendant and Daniel Ceasar to pledge as security for a loan goods of a value of more than $500.00 which had been moving in interstate commerce knowing them to be stolen.

The essence of every conspiracy is an agreement. Since a formal agreement can seldom

be shown by direct evidence that a jury is entitled to infer a conspiracy or an agreement from the actions of the parties. However, in this instance the ability to infer is considerably dulled by direct testimony which actually negates the existence of an agreement.

As noted earlier, Daniel Ceasar testified directly under oath that he did not know that these bonds were stolen either on the day he received them (445a), which was the beginning of the conspiracy, nor at his arrest by the FBI (366a) which, of course, was the end of the conspiracy period. In spite of whatever "queasy feelings" he may have had, he did not have knowledge and so testified.

Mr. Ceasar also testified in several instances that the defendant told him that the bonds were not stolen. (228a). Even after Ceasar's arrest when he had been informed by the FBI that the bonds were stolen and he communicated this fact to the defendant, the

defendant indicated that he did not know that these bonds were stolen (279a). Thus, the two named co-conspirators have provided the Court with uncontradicted evidence that they both lacked knowledge that the bonds were stolen. Under these circumstances, it was impossible for them to agree or conspire to pledge stolen bonds for a loan.

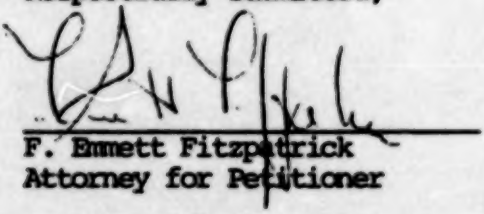
Assuming for the sake of argument sufficient evidence to find an agreement, it is respectfully submitted that the record is devoid of any evidence that either Ceasar or the defendant knew that the bonds were stolen from interstate commerce. As noted in Argument One, the Government never proved that the bonds existed, that they were actually stolen or that they were stolen from an interstate facility. Furthermore, all of the conversations related by Daniel Ceasar regarding the use of these bonds completely failed to indicate any statement or suspicion by anyone that the bonds had been stolen. The "queasy feeling" of Daniel

Ceasar comes only after his arrest. Under all of these circumstances, it is respectfully submitted that the Government has failed to prove the elements of a conspiracy.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that a Writ of Certiorari should be issued to review the decisions of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,



F. Emmett Fitzpatrick
Attorney for Petitioner

August 3, 1982